In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1968

No. 367

UTAH PIE COMPANY,
Petitioner,

vs.

CONTINENTAL BAKING COMPANY, CARNATION COMPANY, and PET MILK COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled cases on May 7, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit as to which review is now sought is reported in CCH Trade Reg. Rep. (1968 Trade Cas.) ¶72,443 (10th Cir. 1968). The prior opinion of this Court

in these cases is reported as *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 87 S.Ct. 1326, 18 L.Ed.2d 406 (1967). The prior opinion of the United States Court of Appeals for the Tenth Circuit, is reported as *Continental Baking Co. v. Utah Pie Co.*, 349 F.2d 122 (10th Cir. 1965). There are no opinions issued by the District Court.

The opinion of the Tenth Circuit as to which review is here sought is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on May 7, 1968. (R. 4). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. May a Court of Appeals properly adhere to its original view of the facts of a case, on remand following a reversal in the Supreme Court, and base another decision upon its original view of those facts, where the Supreme Court's reversal was expressly grounded upon the Court of Appeals' erroneous view of those facts in the first instance?

2. In ruling upon the admissibility of a damage exhibit in a private antitrust case, may a Court of Appeals make its own factual findings with respect to causation, or is it obliged to give the evidence an interpretation best calculated to uphold the ruling of the trial court and sustain the jury's verdict?

3. May a Court of Appeals properly deduce, solely from the dollar amount of a general verdict for unliquidated damages, that a jury has rejected the bulk of plaintiff's claim, although the wrongful acts of the defendant must inevitably have resulted in injury of the type which the Court of Appeals concludes has been rejected?

4. In a private antitrust case in which there is ample evidence to sustain a damage award far greater than the general verdict which the jury has returned, may a Court of Appeals reverse the judgment on the theory that the admission of the plaintiff's damage exhibit was prejudicially erroneous because the Court of Appeals believes that the jury awarded damages on only a portion of the plaintiff's claim, and that the evidence does not support such a large verdict for that portion of the plaintiff's claim?

5. Where the record contains evidence of impact of the type for which an antitrust plaintiff claims damages in its damage exhibits, do objections as to the methods employed in preparing these exhibits go to the weight of the evidence or to its admissibility?

6. May a Court of Appeals predicate a finding of error in the admission of a damage exhibit upon aspects of the exhibit as to which no objection was taken at trial?

7. In a private antitrust action in which the plaintiff claims damages for injury resulting from unlawful pricing activity of several competitors, does the plaintiff carry the burden of proving that damages are entirely and uniquely attributable to the acts of a particular defendant or is it sufficient if the plaintiff shows that a

defendant's unlawful pricing practices were a substantial cause contributing to plaintiff's injury?

8. Did the admission in evidence of Utah Pie's damage exhibits constitute prejudicial error as to any or all of the respondents?

STATUTES INVOLVED

The statutory provisions involved are Section 2 of the Clayton Act, 38 Stat. 731, § 2 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526, § 1 (1936), 15 U.S.C. § 13 (1952); and Sections 3, 4 and 16, of the Clayton Act, 38 Stat. 731, §§ 3, 4, and 16 (1941), 15 U.S.C. §§ 14, 15, and 26 (1952); U.S. Const. amend. VII. These statutes are set out in Appendix B.

STATEMENT

This was an action brought by petitioner Utah Pie Company ("Utah Pie") against three competitors, respondents here,[1] to recover damages suffered by petitioner as a result of respondents' violations of the federal antitrust laws. The jury brought in verdicts finding that each respondent had individually violated Section 2 of the Clayton Act, as amended, to the injury of Utah Pie in stated amounts. (Tr. 1283-1284). Utah Pie and all three respondents are manufacturers of frozen pies. These are "primary line" price discrimination cases.

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[1]Continental Baking Company ("Continental" or "Morton"); Pet Milk Company ("Pet") and Carnation Company ("Carnation").

The Court of Appeals for the Tenth Circuit concluded that the evidence was insufficient to support the jury's verdicts and ordered judgment entered for respondents. 349 F.2d 122 (1965).

This Court granted certiorari and reversed, finding that with respect to each of the three respondents the evidence supported the jury's verdict that its price discriminations violated the antitrust laws. (386 U.S. 685). This Court remanded the cases to the Tenth Circuit for further proceedings. (386 U.S. at 704).

On remand, the Tenth Circuit, in a second opinion, again reviewed the evidence in the case at length, adhering substantially to its original views:

> "In passing on the issue of probable injury to competition in our former opinion, we made what we regarded and still believe was an exhaustive and correct statement of the pertinent facts, in five parts. (See Continental Baking Company v. Utah Pie Company, 10 Cir., 349 F.2d 122.)
>
> . . .
>
> "Reference is here made to the facts set forth in our former opinion and the appendices thereto. . . .
>
> . . .
>
> "Of course, we will undertake to supplement facts set forth in our former opinion by additional facts in the record pertinent to a proper consideration of the additional issues now before us for determination; and we will repeat facts stated in our former opinion where we deem it desirable so to do. . . ." (App. "A" hereto, pp. 6-7).

Based upon its views of the evidence, the Tenth Circuit then again reversed the judgment in favor of Utah

Pie and remanded these cases for retrial on all issues. (App. "A" hereto, p. 74).

The grounds for the Tenth Circuit's reversal this time were that the admission of Utah Pie's damage exhibits was prejudicially erroneous in light of the evidence in the record. The extended opinion of the Tenth Circuit contains substantially no reference to legal authority; it is a re-assertion of the Tenth Circuit's view that, on the evidence, plaintiff has not made out a case.

The "error" which the Court of Appeals now finds is based upon its unaltered conclusion that the jury disregarded most of plaintiff's damage exhibits, that Utah Pie's evidence of "causation" was insufficient to support the award under the other portions of its damage exhibits; that the exhibits should have been excluded, and that their admission in evidence was reversible error.

Utah Pie's basic damage exhibit, which the Tenth Circuit held to have been erroneously admitted into evidence, was Pl. Ex. 95. The various categories of damage claims set forth in Pl. Ex. 95 are as follows:

Line (A): Loss of profit on lost sales under Utah Pie's proprietary "Utah Pie" brand.

Line (B): Lost sales in Seattle, Spokane and Portland areas.

Line (C): Lost sales in Denver (Continental only).

Line (D): Lost sales to Safeway under Bel Air brand (Pet only).

Line (E): Loss of profit due to depressed prices on sales actually made under private labels.

Line (F): Loss of profit due to depressed prices on sales actually made under "Utah Pie" label.

Line (G): Loss due to injury to good will and "going business concern" value.

Supporting exhibits upon which Pl. Ex. 95 is based include Pl. Ex. 62, actually a part of the study prepared by respondents' economics expert; Pl. Ex. 94, prepared by Gaylen Rigby, Utah Pie's sales manager; and Pl. Exs. 96-101, computations prepared by Grant Caldwell, Utah Pie's accounting witness.

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1. THE TENTH CIRCUIT HAS ADHERED TO ITS PREVIOUS VIEWS ON PET'S DISCRIMINATIONS

In reviewing the prior decision of the Tenth Circuit, this Court said, *inter alia:*

> "The Court of Appeals first concluded that Pet's price differential on sales to Safeway must be put aside in considering injury to competition because in its view of the evidence the differential had been completely cost justified and because Utah would not in any event have been able to enjoy the Safeway custom. Second, it concluded that the remaining discriminations on 'Pet-Ritz' and 'Swiss Miss' pies were an insufficient predicate on which the jury could have found a reasonably possible injury either to Utah Pie as a competitive force or to competition generally.
>
> "We disagree with the Court of Appeals in several respects. First, *there was evidence from which the jury could have found considerably more price discrimination by Pet with respect to 'Pet-Ritz' and*

'Swiss Miss' pies than was considered by the Court of Appeals. . . .

"Second, with respect to Pet's Safeway business, the burden of proving cost justification was on Pet and, in our view, reasonable men could have found that Pet's lower priced, 'Bel-air' sales to Safeway were not cost justified in their entirety . . . the jury . . . reasonably could have found a greater incidence of unjustified price discrimination than that allowed by the Court of Appeals' view of the evidence.

"With respect to whether Utah would have enjoyed Safeway's business absent the Pet contract with Safeway, . . . *Pet's evidence that Utah's unwillingness to install quality control equipment prevented Utah from enjoying Safeway's private label business is not the only evidence in the record relevant to that question. There was other evidence to the contrary. The jury would not have been compelled to find that Utah Pie could not have gained more of the Safeway business.*" (386 U.S. at 693-696; emphasis added, footnotes omitted).

The Tenth Circuit paid its respects to this Court's opinion as follows:

"Thus, it will be seen that Safeway's unwillingness to purchase frozen 'Bel-air' pies from Utah Pie was *due to Utah Pie's refusal to meet Safeway's requirements with respect to quality controls, coding device, and type of carton used.*" (App. "A" hereto, p. 36; emphasis added).

This holding is, of course, utterly irreconcilable with this Court's prior express holding on the same point.

Similarly, with respect to the Swiss Miss and Pet-Ritz pricing, the Tenth Circuit has simply disregarded this

Court's holding that its first opinion was wrong. It still relies upon the erroneous tables appended to its original decision. (Appendices II, IV, and V, 349 F.2d at 159-162). For good measure, it reprints as Appendix "B" to its present opinion the same table of Pet-Ritz prices which was Appendix IV to its original opinion. (Compare App. "A" hereto, at p. XVI with 349 F.2d at 161). The Tenth Circuit still finds 9 months of Pet-Ritz discrimination as against 17 months of discrimination found by this Court. (Compare App. "A" hereto, p. 57 with 386 U.S. at 694; App. "A" hereto, p. 60 with 386 U.S. at 694).

The Tenth Circuit is still wrong. Its table of Pet-Ritz pricing for Salt Lake City is appreciably more beneficial to Pet than Pet's own exhibit A-35. The Tenth Circuit's table of Pet-Ritz prices is much more beneficial to Pet with respect to California prices than are Pet's actual invoices for California towns in the Great Valley of California all around its Fresno plant. (Compare App. "A" hereto, p. XVI with Pl. Exs. 116, 118, 119 and 122).

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2. THE TENTH CIRCUIT HAS ADHERED TO ITS PREVIOUS VIEWS ON THE EFFECT OF CONTINENTAL'S CONDUCT

In reviewing the record as to Continental in connection with the "violation" issue, this Court said:

> "Effective for the last two weeks of June it offered its 22-ounce frozen apple pies in the Utah area at $2.85 per dozen. It was then selling the same pies at substantially higher prices in other markets. The Salt Lake City price was less than its direct cost plus an allocation for overhead. Utah's going price at the time for its 24-ounce 'Frost 'N' Flame' apple pie

sold to Associated Grocers was $3.10 per dozen, and for its 'Utah' brand $3.40 per dozen. At its new prices, Continental sold pies to American Grocers in Pocatello, Idaho, and to American Food Stores in Ogden, Utah. Safeway, one of the major buyers in Salt Lake City, also purchased 6,250 dozen, its requirement for about five weeks. Another purchaser ordered 1,000 dozen. Utah's response was immediate. It reduced its price on all of its apple pies to $2.75 per dozen. Continental refused Safeway's request to match Utah's price, but renewed its offer at the same prices effective July 31 for another two-week period. Utah filed suit on September 8, 1961. Continental's total sales of frozen pies increased from 3,350 dozen in 1960 to 18,800 dozen in 1961. Its market share increased from 1.8% in 1960 to 8.3% in 1961. *The Court of Appeals concluded that Continental's conduct had had only minimal effect, that it had not injured or weakened Utah Pie as a competitor, that it had not substantially lessened competition and that there was no reasonable possibility that it would do so in the future.*

"We again differ with the Court of Appeals. Its . . . retrospective assessment fails to note that Continental's discriminatory below-cost price caused Utah Pie to reduce its price to $2.75. . . . Safeway, which had been buying Utah brand pies, immediately reacted and purchased a five-week supply of frozen pies from Continental, thereby temporarily foreclosing the proprietary brands of Utah and other firms from the Salt Lake City Safeway market." (386 U.S. at 698-699; emphasis added).

Although Continental's price cuts directly forced Utah Pie to unprecedented low price levels on all of its pies sold in Salt Lake, the Tenth Circuit specifically holds

that the jury awarded Utah Pie nothing at all for its claim for losses based on the reduced prices at which it was obliged to sell the pies it was actually able to sell. According to the Tenth Circuit, these claims, embodied in Parts (E) and (F) of Pl. Ex. 95, were completely rejected by the jury. (App. "A" hereto, pp. 33-35, 37-38, 47).

But, as this Court's opinion recognized, the price-eroding effect of Continental's 1961 price cuts (for which damages were claimed in Parts (E) and (F) of Pl. Ex. 95) was particularly devastating to Utah Pie.

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3. THE TENTH CIRCUIT HAS ADHERED TO ITS PREVIOUS VIEWS ON CARNATION

This Court analyzed the case against Carnation (and the Tenth Circuit's erroneous view of the evidence) as follows:

> "After Carnation's temporary setback in 1959 it instituted a new pricing policy to regain business in the Salt Lake City market. The new policy involved a slash in price of 60¢ per dozen pies, which brought Carnation's price to a level admittedly well below its costs, and well below the other prices prevailing in the market. *The impact of the move was felt immediately, and the two other major sellers in the market reduced their prices. Carnation's banner year, 1960, in the end involved eight months during which the prices in Salt Lake City were lower than prices charged in other markets. The trend continued during the eight months in 1961 that preceded the filing of the complaint in this case.* In each of those months the Salt Lake City prices charged by Carna-

tion were well below prices charged in other markets, and in all but August 1961 the Salt Lake City delivered price was 20¢ to 50¢ lower than the prices charged in distant San Francisco. The Court of Appeals held that only the early 1960 prices could be found to have been below cost. That holding, however, *simply overlooks evidence from which the jury could have concluded that throughout 1961 Carnation maintained a below-cost price structure and that Carnation's discriminatory pricing, no less than that by Pet and Continental, had an important effect on the Salt Lake City market.*" (386 U.S. at 701; emphasis added).

This Court's opinion recognizes that Carnation's willful, predatory price discriminations had price-depressing as well as business-diverting effects. Nevertheless, the Tenth Circuit concludes that the *only* impact which the jury's verdict encompasses is that for loss of sales in the "Utah Pie" brand, and injury to good will:

"We have shown that the jury's verdict against Carnation was based on parts (A) and (G) of Exhibit 95. . . ." (App. "A" hereto, p. 73).

Moreover, the Tenth Circuit's present opinion attempts to exonerate Carnation in other ways inconsistent with this Court's prior opinion. In particular, the Tenth Circuit continues to treat Carnation's pricing policy not as a result of its own predatory, volitional acts but rather as an innocent matter beyond Carnation's control, and which could not have caused Utah Pie any harm. (See App. "A" hereto, p. 66).

The Tenth Circuit further stated, as fact, that Carnation's price discriminations did not win it any business

which would otherwise have gone to Utah Pie. (App. "A" hereto, esp. p. 73).

Thus, by combining its analysis of the jury's verdict with its own analysis of the causal factors at work in the market, the Tenth Circuit again arrives at the conclusion that Utah Pie's damage claim against Carnation was not supported by the evidence.

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4. THE COURT OF APPEALS HAS "PSYCHOANALYZED" THE JURY'S VERDICTS AS A PREDICATE FOR HOLDING UTAH PIE'S DAMAGE VERDICTS INADMISSIBLE

The jury's verdicts in this case were general verdicts, in each instance for far less than total damage claims:

	Maximum Claim (Pl. Ex. 95)	Verdict (Tr. 1283-1284)
Pet	$261,046	$44,197
Continental	$381,197	$24,994
Carnation	$ 98,892	$29,277

Based upon the amounts of the verdicts, the Tenth Circuit concluded that the jury had found damages in only two of the seven categories covered by Utah Pie's damage exhibit. (See App. "A" hereto, pp. 33-35, 37-38, 47).

The Tenth Circuit reached these conclusions as follows:

> "It will be observed that the jury returned a verdict against Carnation of $29,277, which is exactly $10,000 more than the $19,277 damages allocated to Carnation on the $3.70 per dozen sales price basis in part (A) of Exhibit 95; that it returned a verdict of $24,994 against Continental, which is exactly $10,000 more than the $14,994 damages allocated to

Continental on the $3.70 per dozen sales price basis in part (A) of Exhibit 95; and that it returned a verdict of $44,197 against Pet, which is exactly $10,000 more than the $34,197 damages allocated to Pet on the $3.70 per dozen sales price basis in part (A) of Exhibit 95. (See also Exhibit 96, page 5).

"The *only damages allocated equally among the appellants were the claimed damages for injury to good will in part (G) of Exhibit 95. Hence, it is perfectly clear that the jury based its damages award for loss of sales on the last line of part (A) of Exhibit 95.*" (App. "A" hereto, p. 33; emphasis added).

Having concluded, from this analysis, that the jury has ignored all except Part (A) and Part (G) of Utah Pie's damage study, the Tenth Circuit then proceeds to its lengthy analysis of the evidence. It decides that the evidence does not support Parts (A) and (G) of Utah Pie's damage exhibit in their entirety and concludes that all three cases must be tried over in accordance with special procedures set out in its opinion. (App. "A" hereto, pp. 48-49).

The Tenth Circuit's conclusion that the jury disregarded most of Utah Pie's damage claim is not based upon special interrogatories to the jury, for none were submitted. The jury verdicts were general verdicts on unliquidated claims.

Parts (E) and (F) of Pl. Ex. 95, Utah Pie's damage exhibit, claim damages for *reduced prices on the sales which Utah Pie did make.* (Tr. 528-529). The Tenth Circuit concluded that the jury's verdicts were not based to any extent on impact of that kind, since (according to

Judge Phillips) the jury awarded damages under only Parts (A) and (G) of Utah Pie's damage exhibit.

The Tenth Circuit's conclusion again conflicts directly with this Court's prior opinion. This Court clearly stated:

> "At times Utah Pie was a leader in moving the general level of prices down, and *at other times each of the respondents also bore responsibility for the downward pressure on the price structure. . . . In this case, the evidence shows a drastically declining price structure which the jury could rationally attribute to continued or sporadic price discrimination.*" (386 U.S. at 703; emphasis added).

If respondents' unlawful price discriminations drove the general level of prices down, it is inconceivable that Utah Pie would not have experienced some injury in terms of reduced prices as a result.

Similarly, the Tenth Circuit's opinion excludes the possibility that the jury's verdict against Pet compensated Utah Pie's injury resulting from loss of Safeway business, as claimed in Part (D) of Utah Pie's damage exhibit, Pl. Ex. 95. But the holding that Utah Pie lost none of the Safeway business directly conflicts with this Court's prior holding that "[t]he jury would not have been compelled to find that Utah Pie could not have gained more of the Safeway business." (386 U.S. at 696).

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5. THE WEIGHT TO BE GIVEN TO UTAH PIE'S DAMAGE EXHIBIT WAS LEFT TO THE JURY

At the trial, Grant Caldwell, the accountant who prepared Utah Pie's damage exhibits (Pl. Exs. 95-101) underwent lengthy *voir dire* and cross-examination on all

of those exhibits, and explained both the sources of his information and his methods. (Tr. 523-551).

A large part of the information underlying Caldwell's damage charts came from the defendants. For example, a study of Utah Pie's cost of goods manufactured as computed by Mr. Zimmerman, an accountant retained jointly by all three defendants (Tr. 525); a "flavor mix" revealed by the market study made, for respondents, by Dr. Anderson and Dr. Lamborne (Tr. 526, 527, 535, 547; See Pl. Ex. 62; Tr. 399); "I.B.M. runs" (i.e., computer printouts) prepared by respondents based upon Utah Pie's sales (Tr. 547; see Pl. Exs. 4, 91).

Insofar as Caldwell's damage exhibits rested upon claims of lost sales, they were based upon the opinion testimony of plaintiff's sales manager, Gaylen Rigby, embodied in Pl. Ex. 94 (Tr. 528, 534, 537, 545; Compare Pl. Ex. 94 with Pl. Ex. 95). The same was true with respect to his calculation of injury to Utah Pie's good will (Compare Tr. 522 with Tr. 529).

With one exception, the portions of Caldwell's main damage exhibit (Pl. Ex. 95) which dealt with reduced prices did *not* contain a particular figure representing what would have been a competitive price (See Pl. Ex. 95, Parts (A), (B), (C), and (F)). Instead, Mr. Caldwell made alternative computations based upon a *range* of prices from $4.30 down to $3.70 per dozen, leaving to the jury the decision as to which (if any) of those prices would have prevailed in the absence of defendants' discriminations (Tr. 529, 540-541, 542, 543).

The one exception to Mr. Caldwell's "alternative" approach to price calculations was in Part (E) of Pl. Ex.

95. There Mr. Caldwell calculated the difference between prices which Utah Pie actually received on its *private* label pies and the amount which it would have received if it had received prices comparable to those shown in Pet's Safeway contract (Tr. 537, 550-551; See Pl. Ex. 42).

Pl. Ex. 95 was supported by other exhibits which spelled out the methods used in computing the component parts of Pl. Ex. 95. (See Pl. Exs. 96-101; Tr. 530-539). Caldwell did not purport to testify as an expert in merchandising; he testified that ". . . anybody operating on the same assumptions could have made the same computations." (Tr. 543).

In arguing damages to the jury, plaintiff's counsel did not suggest that Caldwell's charts should be given any greater weight than the jury's view of the facts which supported them. He said, inter alia, in reference to Pl. Ex. 95 ". . . you aren't bound by any of the figures on this chart." (Tr. 1157).

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6. THERE WAS A GREAT DEAL OF EVIDENCE ON DAMAGES IN ADDITION TO UTAH PIE'S DAMAGE EXHIBITS

Evidence which the jury had before it while assessing damages included:

1. The exhibits showing prices charged by defendants in various competitive situations where they were, and were not, competing with Utah Pie (Pl. Exs. 6-16, 20-22, 24-29, 35, 39, 40-42, 52, 56-57, 64-74, 76-80, 83-89, 103, 110-112, 116-122; D. Exs. C-B through C-F), including exhibits which showed that Pet's prices in the Great Valley of California, in the immediate vicinity of its Fresno

plant, were *up* from $4.28 to $4.40 per dozen for Pet-Ritz from 1959 to 1961. (Pl. Exs. 116, 118, 119, 122);

2. The evidence of Utah Pie's sales prices (including its price *increase* from $4.15 per dozen to $4.30 per dozen for "Utah Pie" in 1958, and its subsequent price reductions to $2.75 in 1961). (Pls. Exs. 4, 62, 91; D. Ex. A-35);

3. Dr. Anderson's and Dr. Lamborne's computations, for defendants, of sales volumes, prices and market shares of all sellers in Salt Lake. (D. Ex. PA-35; Pl. Exs. 62, 93);

4. Utah Pie's history of profit and loss as shown by its books. (Pl. Ex. 92);

5. Testimony of Halgren, Carnation vice president, that "Sometimes the market grows from 100,000 to 200,000 cases in a single year. If you don't grow with that, you are not getting your share." (Tr. 1120);

6. Direct testimony of respondents' witness Degenhart that in the absence of respondents' price cuts the level of prices in the market would have remained above $3.70 per dozen. (Tr. 659);

7. Testimony by Dr. Anderson, defendants' economics expert, that loss of market share in the proprietary brand business "could be" a competitive injury. (Tr. 1037, 1038);

8. Gaylen Rigby's testimony, as Utah Pie's sales manager, on Utah Pie's lost sales, reduced prices, and injury to good will. (Tr. 506, 515, 522);

9. Testimony of Myron, Ross, Bryant and Gaylen Rigby that Utah Pie Company had the capacity to handle

additional business without any substantial additional investment. (Tr. 438-439, 446, 455, 471, 520-521);

10. All of the testimony of the witnesses with respect to the nature of the markets for pies, the manner in which pies were priced, and the effects of prices and price changes upon competition and upon the competitive position of competitors in those markets.

This evidence would easily have supported verdicts greatly in excess of the verdicts actually rendered.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The ostensible grounds for the Tenth Circuit's most recent decision in these cases is error in the admission of evidence. However, it cites no law on the admission or exclusion of evidence. Instead, it reviews the evidence, maks inferences, and draws factual conclusions in over 100 typewritten pages, inclusive of tables and appendices.

The Tenth Circuit's conclusion is that Utah Pie's damage exhibit should not have been admitted in evidence *in the light of the facts as it finds them.* The "error" is in admitting an exhibit which does not comport with the Tenth Circuit's view of the facts.

Moreover, the Tenth Circuit's present view of the facts, following this Court's opinion, is substantially unchanged from that set out in its prior opinion. It now says: "In passing on the issue of probable injury to competition in our former opinion, we made what we regarded and still believe was an exhaustive and correct statement of the pertinent facts, in five parts." (App. "A" hereto, p. 6.)

The Tenth Circuit was wrong on the facts the first time. See this Court's prior opinion, *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 87 S. Ct. 1326, 18 L. Ed. 2d 406 (1967).

It is still wrong on the facts, and the inferences which a jury could reasonably draw from them. Its numerous conclusions with respect to causation are a completely unwarranted invasion of the jury's province. The Tenth Circuit's approach in these cases conflicts directly with prior pronouncements of this Court. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700-701, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962), cf. opinion of Mr. Justice White, *Perma-Life Mufflers, Inc. v. International Parts Corp.*, ___ U.S. ___, ___, ___ St. Ct. ___, ___ L. Ed. 2d ___ (June, 1968).

As one of the cornerstones of its decision, the Tenth Circuit has undertaken to assay the mental processes by which the jury arrived at its general verdicts by analyzing the amounts of the verdicts. In so doing, the Tenth Circuit has come into direct conflict with other Circuits, and most particularly the Second Circuit, which have held that such an analysis is not possible and should not be undertaken. This error has ramifications greatly transcending the field of private antitrust cases.

In its analysis of Utah Pie's damage exhibit, the Tenth Circuit has again come into conflict with other Circuits, and with the prior decisions of this Court dealing with damage proof in antitrust cases. The Tenth Circuit, in ruling Utah Pie's damage study inadmissible, has misplaced the burden of the uncertainty inherent in the damage proof in a case of this kind. Its instructions with

respect to the method of proving damages on remand and the burden of proof are again erroneous and in conflict with the law of other circuits.

Because the Tenth Circuit has deviated so greatly from the principles laid down by this Court and by other circuits, and because of the importance of the antitrust laws to the nation's economic well-being, and the importance of the private remedy for enforcement of the antitrust laws, the Tenth Circuit's decision in these cases should be reviewed.

REASONS FOR GRANTING THE WRIT

1. THE TENTH CIRCUIT'S OPINION CONFLICTS WITH THE DECISION OF THIS COURT IN THE SELF-SAME CASE

Judge Phillips' second opinion for the Tenth Circuit in this case presents an absolutely irreconcilable conflict with the prior opinion of this Court. In part, Judge Phillips has categorically contradicted this Court's prior opinion. In part, he has analyzed the record in a manner completely at odds with this Court's views of the evidence and its significance. Throughout his opinion, he has construed the record in such a way as to support reversal of the judgments which had been entered in favor of Utah Pie, rather than to support affirmance. No matter how sincerely a Court of Appeals may be convinced that it would have reached a different result as a trier of fact, it has neither the power nor the right to disregard the pronouncements of this Court.

Judge Phillips, in the Tenth Circuit's present opinion says:

". . . in our former opinion, we made what we regarded and still believe was an exhaustive and correct statement of the pertinent facts . . ." (App. "A" hereto, p. 6).

In reversing the Tenth Circuit's first decision in this case, this Court found any number of points on which the Tenth Circuit's original opinion did *not* correctly state the facts:

"We disagree with the Court of Appeals in several respects." (386 U.S. at 693).

"[T]he jury could have found considerably more price discrimination with respect to 'Pet-Ritz' and 'Swiss Miss' pies than was considered by the Court of Appeals." (386 U.S. at 693-694).

". . . the jury . . . reasonably could have found a greater incidence of unjustified price discrimination than that allowed by the Court of Appeals' view of the evidence." (386 U.S. at 695).

"The Court of Appeals first concluded . . . Utah would not in any event have been able to enjoy the Safeway custom. . . . There was other evidence to the contrary. The jury would not have been compelled to find that Utah Pie could not have gained more of the Safeway business." (386 U.S. at 693, 695-696).

"Third, the Court of Appeals almost entirely ignored other evidence which provides material support for the jury's conclusion. . . ." (386 U.S. at 696).

"We again differ with the Court of Appeals." (386 U.S. at 699).

"That holding, however, simply overlooks the evidence. . . ." (386 U.S. at 701).

This Court should insist upon respect for its views in the Courts of Appeals. Otherwise, it will write well-considered opinions which, in the last analysis, have no practical effect upon the administration of justice.

In fact, it is apparently becoming customary in recent years for Courts of Appeals to adhere to their original results in Robinson-Patman cases, after reversal by this Court, by slight modifications in approach, and by placing the decision on a different ground. Compare *Borden Co. v. FTC (cease and desist order set aside)*, 339 F.2d 133 (5th Cir. 1964), *reversed* 383 U.S. 637, 86 S. Ct. 1092, 16 L. Ed. 2d 153, *cease and desist order again set aside*, 381 F.2d 175 (5th Cir. 1967); *Anheuser-Busch, Inc. v. FTC (cease and desist order set aside)*, 265 F.2d 677 (7th Cir. 1959), *reversed* 363 U.S. 536, 80 S. Ct. 1267, 4 L. Ed. 2d 1385, *cease and desist order again set aside* 289 F.2d 835 (7th Cir. 1961) with *Moore v. Mead Service Co.* (*nonsuit affirmed*), 184 F.2d 338 (10th Cir. 1950) *remanded per curiam*, 340 U.S. 944, 71 S. Ct. 502, 95 L. Ed. 681, *remanded for trial* 190 F.2d 540 (10th Cir. 1951); *judgment for plaintiff reversed with instructions to dismiss*, 208 F.2d 777 (10th Cir. 1953), *Tenth Circuit reversed, judgment for plaintiff on verdict affirmed*, 348 U.S. 115, 75 S. Ct. 148, 99 L. Ed. 145.

2. IN THE GUISE OF AN EVIDENCE RULING, THE TENTH CIRCUIT HAS INVADED THE JURY'S PROVINCE TO DECIDE QUESTIONS OF CAUSATION

The Tenth Circuit's decision is riddled with conclusions about causation.[2] For example:

". . . because Utah Pie was unwilling to meet Safeway's requirements as to quality control and coding device, as stated above, Safeway would not have purchased from Utah Pie 'Bel-air' frozen fruit pies at any price. . . ." (App. "A" hereto, p. 37). (But see this Court's precisely contrary conclusion, 386 U.S. 685, at 695-696, 87 S. Ct. 1326, 18 L. Ed. 2d 406)

". . . it would be unreasonable to infer that Pet's gain resulted from any sales loss by Utah Pie." (App. "A" hereto, p. 63).

"What Utah Pie lost in 1959 went not to Carnation, but to other sellers in that market area. . . ." (App. "A" hereto, p. 73).

"The market share of both Carnation and Utah Pie increased in 1960, but it is clear that those gains resulted from loss of market share by sellers other than Utah Pie and Carnation." (App. "A" hereto; p. 73).

". . . Gaylen S. Rigby testified it was his opinion that, but for the price discriminations of the appellants, the sales of . . . 'Frost 'N' Flame' brand frozen pies to Associated Grocers and the reduction of Associated Grocers' purchases of 'Utah' brand pies to an insignificant number in each of those years would not have affected or decreased the sales of 'Utah' brand pies . . . and that Utah Pie would have

[2]Of course, the Tenth Circuit's entire opinion is devoted to an elaborate discussion of the Circuit's views on the market for pies, pricing, marketing conditions, competitive factors, etc. which bear upon causation.

continued to maintain a market share percentage of 70.41 per cent of the frozen pies sold by it and the appellants, exclusive of controlled and private brand frozen pies, through the sale of more 'Utah' brand pies to other buyers in such market area.

"Moreover, Rigby was assuming that, absent such discriminations, Utah Pie would have continued to sell 'Utah' brand frozen pies at not less than $3.70 per dozen in 1960 and 1961. . . .

"We believe the conclusion is inescapable that the failure of Utah Pie to maintain in 1960 and 1961 the market share percentage of frozen pies, exclusive of controlled and private brand frozen pies, sold by it and the appellants in the Salt Lake City market area in 1958 . . . was due in a very large part to the fact that Associated Grocers, . . . purchased only an insignificant number of 'Utah' brand pies in 1960 and 1961; and that it was not due in substantial part to any relative increase of sales in such market area in 1960 and 1961 by the appellants of their brands of frozen pies." (App. "A" hereto, pp. 29-30).

As this Court observed in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962), "[u]ndoubtedly, all of the evidence . . . does not point in one direction and different inferences might reasonably be drawn from it. There was, however, sufficient evidence to go to the jury and it is the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts.'" The Tenth Circuit has clearly violated those principles here.

THE TENTH CIRCUIT'S OPINION CONFLICTS WITH THE OPINIONS OF OTHER CIRCUITS ON THE INTERPRETATION OF JURY VERDICTS

One of the indispensable building blocks of the Tenth Circuit's most recent holding in this case is its analysis of how the jury arrived at its general verdicts. (See App. "A" hereto, pp. 33-35, 37-38, 47).

The Tenth Circuit, through use of certain arithmetical calculations, has given the jury's general verdicts the effect of verdicts on special interrogatories to the jury. It has concluded that the jury awarded nothing on account of most of the claims set forth in Utah Pie's damage exhibit (Parts (B), (C), (D), (E) and (F)), but did award specific amounts under the other parts of that exhibit (Parts (A) and (G)). (See App. "A" hereto, pp. 33-35, 37-38, 47.)

That holding flouts the well-established principle that a general verdict ". . . throws its mantle of impenetrable darkness over the operations of the jury." *Foster v. Moore-McCormack Lines,* 131 F.2d 907, 908 (2d Cir. 1942). A general verdict is an "impenetrable mystery." *Delta Engineering Corp. v. Scott,* 322 F.2d 11, 15 (5th Cir. 1963).

The Second Circuit, quoting Sunderland, Verdicts, General and Special, 29 Yale L. J. 253 (1920), states: "No judicial reagents exist for either a qualitative or quantitative analysis. The law supplies the means for determining neither what facts were found, nor what principles of law were applied, nor how the application was made. . . . *The general verdict is as inscrutable and essentially mysterious as the judgment which issued from*

the ancient oracle of Delphi." Skidmore v. B & O RR. Co., 167 F.2d 54, 60 (2d Cir. 1948), cert. den. 335 U.S. 816, 69 S. Ct. 34, 93 L. Ed. 371 (emphasis added).

In an earlier Second Circuit antitrust case, the damage claim was $14,402.26 and the verdict for $7,701.13, or exactly one half of the claim-plus-$1,000.00. The Second Circuit said: ". . . with the jury's method of arriving at the result we have no concern." *(Straus v. Victor Talking Machine Co.,* 297 Fed. 791, 804 (2d Cir. 1924).)

The Tenth Circuit's analysis of the jury's verdicts, a keystone of its decision, is in conflict with the well-established rule in other circuits, and indeed in American practice generally. For this reason alone, the decision of the Tenth Circuit should be reviewed and reversed.

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4. THE COURT OF APPEALS HAS BASED ITS DECISION ON PURPORTED ERRORS AS TO WHICH NO ADEQUATE OBJECTION WAS MADE AT TRIAL

The Court of Appeals says "[o]ver the objections of each of the appellants, Utah Pie introduced its Exhibit 95. . . ." (App. "A" hereto, p. 22). It also says "[o]ver objections of each of the appellants, Utah Pie also introduced its Exhibits 62, 94, and 96 to 101, inclusive, upon which Exhibit 95 is based." (App. "A" hereto, p. 25.) This considerably overstates the case.

In the first place, it is not true. Some objections were made by all respondents, and some objections by only one or two of them. Moreover, and more important, the

"errors" upon which the Tenth Circuit bases its reversals were not, in part, suggested at the trial of the case.

Specifically, Gaylen Rigby's testimony that Utah Pie had suffered a loss of $75,000 in good will was admitted in evidence *without any objection* whatsoever. (Tr. 522). No objection was ever taken to the allocation of that claim between all of the respondents equally. Nevertheless, the Court of Appeals ruled that it was "grossly unfair to Continental for the accountant . . . arbitrarily to allocate to Continental the same amount for loss of good will as it did to each of the other appellants." (App. "A" hereto, pp. 47-48).

The Tenth Circuit also holds that it was "manifest error" to admit part (A) of Pl. Ex. 95 into evidence against Continental because that exhibit claimed damages for the years 1959 and 1960 during which, according to the Tenth Circuit, Continental had caused Utah Pie no injury. (App. "A" hereto, p. 47). Again, however, *no objection* on this ground was ever made at the trial.

The so-called "errors" with respect to the admission of Pl. Ex. 95 against Pet and Carnation is that ". . . parts (A) and (G) of Exhibit 95 and the exhibits on which such parts were based, presented a clearly erroneous factual foundation for the computation of damages and . . . their admission was plain and prejudicial error." (App. "A" hereto, p. 64, cf. p. 73).

As already observed, there was no objection taken to the testimony of $75,000 of lost good will, or to its allocation among respondents in part (G). If the allocation was unfair to Continental in the sense that it allocated

too much of this damage to Continental, it was certainly more than fair to Pet and Carnation. But in any event, *no objection* was made.

It is well settled that, despite the liberality of Fed. R. Civ. P. 46 abolishing formal exceptions, a specific statement of the grounds of objection to the admission of evidence must be made. *Carona v. Pioneer Life Ins. Co.*, 357 F.2d 477 (5th Cir. 1966).

The Tenth Circuit's disregard of this fundamental principle requires review and correction.

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5. THE TENTH CIRCUIT'S OBSERVATIONS GO TO THE WEIGHT OF THE EVIDENCE, NOT TO ITS ADMISSIBILITY

Respondents did present certain objections with respect to Utah Pie's damage exhibits during the course of the trial. They objected to the method of computation of market shares for the "name" brand pies. They also had extensive *voir dire* and cross-examination with respect to these computations and the basis upon which they were made. (Tr. 514-551).

At the close of Utah Pie's examination of the accountant, and its introduction of the damage exhibits, the trial court said: "I think all these objections go to the weight, rather than the admissibility of this exhibit." (Tr. 538). The opinion of the experienced trial judge in this case is itself worthy of considerable weight.

As the second circuit observed in *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 912 (2d Cir. 1962), "[t]here is no bright line that divides evi-

dence worthy of consideration by a jury, although subject to heavy counter-attack, from evidence that is not. Especially because of the guaranty of the Seventh Amendment, a federal court must be exceedingly careful not to set the threshold to the jury room too high."

Although the second circuit affirmed the District Court in excluding damage evidence in the *Herman Schwabe* case, it did so on facts materially different from those in the cases at bar. Moreover, the Second Circuit decision in *Herman Schwabe* was an *affirmance* of the trial court's ruling, not a reversal of it.

In this case, the Tenth Circuit *has* "set the threshold to the jury room too high." Its decision should be reviewed and the proper threshold for the admission of damage evidence in cases like this definitively determined for the benefit of bench and bar.

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6. THE TENTH CIRCUIT'S OPINION CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL ON PROOF OF DAMAGES IN ANTITRUST CASES

This Court has repeatedly upheld verdicts in private antitrust cases over objections that the plaintiffs had failed to prove damages with requisite certainty. See *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684 (1927), and *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931).

Utah Pie's evidence in this case left no doubt that defendants' violations had had an adverse impact on Utah Pie's business and property. Once that was established, Utah Pie was entitled to a verdict based upon such a reasonable estimate of the *amount* of damages as the evidence would permit.

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 567, 51 S.Ct. 248, 252, 75 L.Ed. 544, 550 (1931), and *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 378, 47 S.Ct. 400, 405, 71 L.Ed. 684, 691 (1927), allow proof of damages by opinion testimony.

In numerous decisions in other circuits, recovery based upon opinion damage testimony has been permitted. For example, in *William H. Rankin Co. v. Associated Bill Posters*, 42 F.2d 152, 155 (2d Cir. 1930), plaintiff was permitted, over objection, to

> "... show by the testimony of its treasurer and by a compilation he had made, based on the net profits of the business in 1911 and from his knowledge of business conditions when free of the defendants' unlawful interference, *what he considered would have been the normal increase of this plaintiff's business from year to year.*" (42 F.2d at 155; emphasis added).

Judgment for Rankin was affirmed. The *Rankin* case has been followed, on this point, in *A. C. Becken Co. v. Gemex Corp.*, 272 F.2d 1, 5 (7th Cir. 1959).

The Ninth Circuit, in *Richfield Corp. v. Karseal Corp.*, 271 F.2d 709 (9th Cir. 1959) analogized the private antitrust action to a personal injury action, and noting that:

"In neither [type of case] can the plaintiff prove to any mathematical certainty, what are the damages in dollars and cents." (271 F.2d at 715).

More recently, the Ninth Circuit upheld a judgment for plaintiff based upon opinion testimony in *Rangen, Inc. v. Sterling H. Nelson & Sons*, 351 F.2d 851, 856 (9th Cir. 1965).

Still more recently, the Ninth Circuit has had occasion to consider a judgment assertedly based upon "unsupported 'mere interested guesses'" in *Washington State Bowling Prop. Ass'n. v. Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir. 1966). The Ninth Circuit said:

> "Once a jury finds plaintiff was injured by defendant's unlawful acts, it may estimate the amount of damages proximately flowing from the illegal act. In showing the *fact* of damage, plaintiff is charged with a higher quantum of proof than in proving the *amount* of damage. . . . As to amount, exact certainty or any precise formula is not required. . . ." (356 F.2d at 379).

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7. THE TENTH CIRCUIT HAS MISPLACED THE BURDEN OF PROOF IN CASES OF THIS KIND

Although it has not held that joinder for purposes of trial is improper in these three cases, the Court of Appeals has very minutely prescribed the manner in which the case should be retried. (App. "A" hereto, pp. 48-49). In effect, the Court of Appeals has ordered three separate consecutive trials, requiring each defendant to conclude its separate defense before the special evidence against the next defendant is presented. As the Court of Appeals assesses the result:

"This means that Utah Pie must prove its damages against each appellant separately and should not be permitted to introduce evidence to establish a claim of damages in one lump sum and then distribute it to the several appellants." (App. "A" hereto, p. 49).

This ill-conceived procedure completely misallocates the burden of proof with respect to the uncertainties inherent in a case of this kind. The difficulties inherent in separating those elements of damage which are attributable to one defendant from those attributable to another, should fall upon defendants who have indulged themselves in unlawful conduct, rather than upon an innocent plaintiff.

Section 433A of *Restatement of Torts*, 2d, reads as follows:

"Apportionment of Harm to Causes

"(1) Damages for harm are to be apportioned among two or more causes where

(a) there are distinct harms, or

(b) there is a reasonable basis for determining the contribution of each cause to a single harm.

"(2) Damages for any other harm cannot be apportioned among two or more causes."

Assuming, however, that the source of harm *is* allocable, the burden of the apportionment is upon the defendant and not upon the plaintiff. See *Restatement of Torts*, 2d, Section 433B.

8. THE TENTH CIRCUIT HAS APPLIED AN INCORRECT RULE OF CAUSATION

The decision of the Tenth Circuit apparently would require Utah Pie to precisely distinguish between injury caused by the violations of each of the respondents separately. (App. "A" hereto, p. 49).

The rule is otherwise:

> "Normally, it would be enough with respect to causation if the defendant 'materially contributed' to plaintiff's injury, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702 (1962); or 'substantially contributed, notwithstanding other factors contributed also', *Momand v. Universal Film Exchanges, Inc.*, 172 F.2d 37, 43 (C.A. 1st Cir. 1948), cert. denied, 336 U.S. 967 (1949). The plaintiff need not show that the illegality was a more substantial cause than any other. *Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798, 805-806 (C.A. 1st Cir.), cert. denied 379 U.S. 931 (1964)." (Concurring op. of Mr. Justice White, *Perma Life Mufflers, Inc. v. International Parts Corp.*, ____ U.S. ____, ____ S.Ct., ____ L.Ed.2d ____.

To eliminate uncertainty about the applicable rule, the Tenth Circuit's decision should be reviewed and reversed.

CONCLUSION

The decision of the Tenth Circuit in these cases simply disregards this Court's prior decision in these very cases (as well as the record). The decision of the Tenth Circuit also conflicts with decisions of other circuits, and this Court, on points which are fundamental to the review

of jury verdicts in federal courts in general, and to the administration of the federal antitrust laws in particular. If left unreversed, the Tenth Circuit's decision in this case will sow confusion for years to come in a field of litigation which now occupies more of the time of the federal courts than any other type of litigation. For these reasons, the Petition for Writ of Certiorari should be granted, and the decision of the Tenth Circuit reversed.

Dated, San Francisco, California,
July 29, 1968.

Respectfully submitted,
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(Appendices Follow)